1988

Sweeney Land Company v. Gilbert Kimball : Brief of Appellee

Utah Supreme Court

Gerald H. Kinghorn; Attorney for Counterclaim-Crossclaimants; Paul D. Veasy; Biele, Haslam, and Hatch; Attorneys for Plaintiff/Appellee.
Robert Felton; Attorney for Appellees.

BRIEF

Utah Supreme Court

SWEENEY LAND COMPANY,

Plaintiffs and Appellees,

vs.

GILBERT KIMBALL and
MAUD KIMBALL,

Defendants and Appellees,

GILBERT KIMBALL and
MAUD KIMBALL,

Crossclaim Plaintiffs
and Appellees,

vs.

MELVIN FLETCHER and
PEGGY FLETCHER, et al.,

Petitioners and Appellants.

CASE NO. 880485

Priority No. 13

BRIEF OF APPELLEES MAUD AND GILBERT KIMBALL

APPEAL FROM A JUDGMENT OF THE UTAH COURT OF APPEALS

Gerald H. Kinghorn, 1825
Attorney for Appellants/
Petitioners/Counterclaim-
Crossclaimants Melvin Fletcher
and Peggy Fletcher
9 Exchange Place, Suite 1000
Salt Lake City, Utah 84111
Telephone: (801) 364-

Paul D. Veasy, 3964
BIELE, HASLAM & HATCH
Attorneys for Plaintiff/Appellee
Sweeney Land Company
50 West Broadway, Fourth Floor
Salt Lake City, Utah 84101
Telephone: (801) 328-1666

Robert Felton, 1056
Attorney for Defendants/Appellees
Gilbert and Maud Kimball
310 South Main Street
Suite 1305
Salt Lake City, Utah 84103
Telephone: (801) 359-9216

Utah Supreme Court

SWEENEY LAND COMPANY, Plaintiffs and Appellees, vs. GILBERT KIMBALL and MAUD KIMBALL, Defendants and Appellees,	
GILBERT KIMBALL and MAUD KIMBALL, Crossclaim Plaintiffs and Appellees, vs. MELVIN FLETCHER and PEGGY FLETCHER, et al., Petitioners and Appellants.	CASE NO. 880485 Priority No. 13

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Attorneys for Plaintiff/Appellee
Sweeney Land Company
50 West Broadway, Fourth Floor
Salt Lake City, Utah 84101
Telephone: (801) 328-1666

Robert Felton, 1056
Attorney for Defendants/Appellees
Gilbert and Maud Kimball
310 South Main Street
Suite 1305
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JURISDICTION AND NATURE OF CASE

Jurisdiction is conferred by Title 78, Chapter 2, Section 2, Subsection 5, U.C.A. authorizing review by the Supreme Court of Utah of the decisions of the Court of Appeals by Writ of Certiorari.

This is an appeal by Melvin Fletcher and Peggy Fletcher from a decision of the Utah Court of Appeals quieting title to certain property in Park City, Utah to Maud and Gilbert Kimball.

STATEMENT OF ISSUES

There is some confusion as to the issues presented since the issues which were accepted for review have been rephrased or restated in Appellant's Brief to create new issues. Respondents object to these issues as not being those accepted for review and believe this Court should dismiss this action as being beyond the scope of review granted. In response to Appellant's Brief, the issues presented are:

1. The Court of Appeals applied the proper standard of review in its decision, which should be affirmed.

2. Laches is a proper defense to this action where the Fletchers and their predecessors unreasonably delayed in bringing the action and the Kimballs were prejudiced thereby.

3. The doctrine of estoppel bars Fletchers' claim in this quiet title action.

4. Permissive use defeats any claim by Fletchers for prescriptive rights to the Kimball property.

DETERMINATIVE STATUTES OR RULES

There are no statutes applicable to this determination.

Rule 52(a) Utah Rules of Civil Procedure is applicable to the standard of review applied by the Court of Appeals which states, in part:

> "Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall

be given to the opportunity of the trial court to judge the credibility of the witness."

STATEMENT OF CASE

This was a quiet title action to ascertain ownership of three parcels of contiguous land located near the old Coalition building (now destroyed by fire) in Park City, Utah. Just before commencement of trial, Sweeney Land Company and Fletchers settled their property line dispute with an exchange of deeds and Settlement Agreement. Gilbert and Maud Kimball claim title to the property based on a 1940 deed from Summit County, as well as the fact that the property had been described on the plats in the Summit County Recorder's office for many years. After the commencement of this action, but prior to trial, it was discovered that Gilbert Kimball's deceased brother, Robert's name had been put on the original deed. Appellant Fletchers approached Robert's widow, Elizabeth and talked her into giving them a Quit-Claim Deed. No consideration was given for the Deed, nor did Mrs. Kimball receive anything for that exchange. Thereafter, Fletchers asserted a co-tenant interest in the property as a result of this Deed (T.p. 386, F.F. #4). Robert Kimball had categorically disclaimed any interest in the property at least 25 years before this claim.

The trial was held and the Judge entered judgment partitioning the property (Addendum 2). Counsel for Fletchers prepared Findings, Conclusions and Decree and submitted them to the Court. Counsel for Fletchers altered the Judge's ruling and redivided the parcel contrary to the decision. In spite of this fact the Judge signed

the Decree as prepared by Fletchers' counsel and refused to amend the Decree or make any findings as to why he allowed counsel to change the property distribution (C.A. Opinion, p. 7; Addendum 3).

The Utah Court of Appeals, in its Opinion filed October 3, 1988 (Addendum 1), found that the Fletchers acquired no interest in the Kimball property either through the Quit-Claim Deed from Elizabeth Kimball or under the Doctrine of Adverse Possession. The Court of Appeals also found that Findings of Fact entered by the Trial Court were "clearly erroneous" and that the Trial Court made no findings concerning the "extensive evidence" demonstrating that Robert Kimball not only intended that Gilbert and Maud Kimball own the property, but also that he took no action in over 40 years to assert any ownership or interest in the property whatsoever. The Court of Appeals found that Fletchers were barred by the doctrine of estoppel and laches and quieted title to the disputed parcel to Kimballs.

SUMMARY OF ARGUMENT

1. The Court Of Appeals Properly Applied The Standard For Appellate Review Of The Facts In This Action.

The Court of Appeals, in its decision, carefully reviewed the Findings of Fact in this case. The Court of Appeals applied the proper standard of appellate review to their findings and stated on page 2 of their Opinion that they applied a "clearly erroneous" standard in reversing the Trial Court's Judgment.

2. The Court Of Appeals Properly Ruled That Fletchers' Claim Was Barred By The Doctrine Of Laches

During 40 years, Fletchers' predecessor renounced all interest in the property and was also silent as to any claim or responsibility of ownership. Maud and Gilbert Kimball relied on this and did not pursue their claim. Now, after Robert's death, they must defend their title.

3. Estoppel Also Bars Fletchers' Claim

The Court of Appeals properly recognized the relationship of the parties and found clear evidence and unrefuted testimony that Robert Kimball renounced his interest in the property and, after his death, his heirs or successors are attempting to repudiate his actions to the prejudice of Maud Kimball.

4. The Court Of Appeals Found That The "Clear Weight Of The Evidence" Established That Any Use The Fletchers Made Of The Property Was Permissive And Therefore Could Not Be Prescriptive Or Adverse

The Kimball and Fletcher families had been close friends for at least 40 years. All of the Fletchers, including Mel Fletcher, knew that because of that friendship they could use Gilbert's property. Mel Fletcher admitted this consensual use at trial.

STATEMENT OF FACTS

Respondent strongly disagrees with the Statement of Facts set forth in the Brief of the Appellant as being selective and not

reflective of the basis for the Court of Appeals' decision. The record amply supports the findings as determined by the Court of Appeals as set forth on Pages 3, 4, and 6 of that Opinion (Addendum 1). The findings of fact as determined by the Court of Appeals are reproduced herein with citations to the record as required by Rule 24(a)(7), R. Utah S. Ct.

The Fletchers' claim to Kimballs' property is based solely on a Quit-Claim Deed which the Fletchers obtained from Robert Kimball's widow, Elizabeth Kimball. There was no consideration nor money paid by Fletchers to Elizabeth Kimball for that Deed (T. p. 180).

Robert and Gilbert Kimball purchased the property in 1940 (T. p. 205). Elizabeth testified that Robert and she departed Park City in 1940 and never again resided in that location (T. p. 206). Although Elizabeth stated Robert had not been in Utah during 1947 and 1953, she did testify that her late husband did make some visits, in fact, they came to Utah as often as "every couple of years" (T. p. 211).

Maud Kimball testified that taxes on the property for the years 1942 through 1947 were delinquent but were redeemed by Gilbert Kimball. Maud and Gilbert have made the payment for real property taxes since that time (T. p. 121). Maud stated that neither Robert nor his Estate made any contribution to property taxes (T. p. 120). Maud testified that she was present in 1940 or 1941 when Gilbert and Robert had a discussion relative to the property. When Gilbert asked Robert "if he wanted to pay half of the taxes" Robert said "hell no, I want to get out of Park City. I want to move away, and I want nothing further to do with this" (T. p. 126). Maud also stated that the brothers discussed the property in 1947 (T. p. 127) and that "my

husband Gilbert asked if [Robert] wanted to redeem himself and be put back for half of the taxes, and he said, no, I"m living in California now, and I still want nothing to do with it" (T. p. 128).

Maud Kimball attempted to clear up some discrepancies as to the exact date these conversations occurred, which was over 40 years ago. She stated that Robert told her and Gilbert to remove his name from the deed, but because he was on vacation, Robert would not go to the County seat and clarify the matter with a quit-claim deed (T. pp. 141-144, 148). While the exact year may be disputed, the conversations themselves are unrefuted.

Gary Kimball, a son of Gilbert and Maud Kimball, testified that, in about 1953, he was present during conversations between his father and Robert Kimball when Gilbert Kimball informed Robert what he had done in order to clear up the title to the property, and testified that "[Robert] said it was fine with him. He was out of Park City. He was gone for good and had no more interests here" (T. p. 156).

Gilbert Kimball's deposition was taken before his death and he stated "long before my brother died he said he had nothing to do with this property, he refused to pay any part of the taxes on it, so he let the property go to taxes. We bought it back in my name in 1947." Even Mel Fletcher supported the fact that everyone knew Gilbert and Maud Kimball owned the property since Mel offered to buy the property from Gilbert for $60,000.00, but Gilbert refused the offer (T. p. 180).

Attached to the Notice of Probate Distribution recorded by Fletcher's counsel was the Decree of Distribution concerning Robert's

Estate. That Decree of Distribution referred only to Robert's home in Salt Lake City and did not mention this property (Addendum 4).

On January 18, 1984 in the Third District Court of Salt Lake County, in response to a petition to reopen Robert Kimball's Estate to determine the ownership of this property, counsel for Elizabeth Kimball stated:

> "I would like to simply offer one more time that I enter an appearance on behalf of Elizabeth Kimball in the District Court in Summit County and enter disclaimer of any interest coming to her since she is the only person, the only litigee, the only devisee is entitled to do the entire estate . . . "[emphasis added]
>
> (Ex K-15, T. p. 21)

The Court of Appeals found, at page 4,

> "However, the (trial) court made no findings concerning the extensive evidence showing Robert's intent that the Kimballs have the property. No evidence was presented in rebuttal."

In addition to the uncontroverted testimony that Robert Kimball and his Estate had (1) completely dismissed and abandoned any interest in this property; and (2) affirmatively disclaimed and surrendered all interest to Kimballs, the record contains "overwhelming evidence" indicating Fletchers had permission to use parts of the property (C.A. Opinion, p. 6). Gilbert Kimball, in his deposition, stated that Mel Fletcher's father had asked him for permission to "use the ground" the permission was granted as long as Kimballs "had no use for it." Gilbert also claimed that Mel Fletcher's

father believed he owed rent, but because of the friendship between the families Gilbert refused to accept it. The deposition asserts that Gilbert offered to sell Mel Fletcher the property, but the two never agreed on a price. Mel Fletcher himself testified he offered Gilbert $60,000.00 for the property but was refused (T. p. 180). In addition, evidence was submitted in the form of a statement written by Juanita Fletcher Love, Roy's daughter and Melvin's sister, which reflected that it was her understanding that the property belonged to Gilbert and was used with his permission (Addendum 5). Another exhibit was received at trial, written by Marion Fletcher, Roy's son and Melvin's brother, which again reiterates the permissive use of the property (Addendum 6). Maud testified that the Fletcher family always had permission to use a portion of the Kimball property (T. pp. 130-132). Gary Kimball testified that he was actually present when Gilbert discussed the property with Melvin and the later made an offer of approximately $90,0000 to $96,000.00 (T. p. 157). Melvin also testified in response to whether or not he had permission to use this property "in a sense, yes, if they (the Kimballs) owned the ground" (T. p. 179).

Reflective of the Trial Court's confusion and lack of review of the evidence is that, at the conclusion of the trial on September 6, 1985, the Judge entered judgment partitioning the subject property into five distinct parcels which were awarded one to Sweeney, one to Kimball and three to Fletchers. For some unknown reason, counsel for Fletchers prepared findings and judgment which distinctly rewrote the distribution of the property and divided two parcels up with 50% ownership to Sweeney and 50% to Kimballs. No reason or

basis was ever given to this and request by counsel by Kimballs to correct this error was denied by the Judge. It is this action which is questioned in the Court of Appeals' Opinion, footnote 2 on page 7 (Addendum 1).

ARGUMENT

Point I

The Court of Appeals Applied The Proper Standard Of Review

The Court of Appeals applied the proper standard of review to this action. The Court stated at page 2:

> "Utah R. Civil Procedure 52(a) requires that, 'findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witness.' We are bound to follow the rule together with the Utah Supreme Court's guidance, concerning the validity of findings of fact, in *Acton v. Deliran*, 737 P.2d 996, 999 (Utah 1987). This court will 'accord conclusions of law no particular deference, but review them for correctness.' *Sharf v. BMG Corp.*, 700 P.2d 1068, 1070 (Utah, 1985).

This standard was currently reaffirmed by this Court which reiterated that the "clearly erroneous standard" applies to cases characterized as either ones in equity or in law." *Reid v. Mutual of Omaha Insurance Company,* 110 Ut. Adv. Rpts. 12 (1989).

Fletchers' argument, while couched in terms of misapplication of the proper standard of review, is actually an attempt to have this Court review the sufficiency of the evidence. The only testimony marshalled by Fletchers to support this application is found on page 12 of their Brief. It relates, not to the truth of the assertions that Robert Kimball left Park City and told Gilbert and Maud the property belonged to them and, thereafter, for the next 40 years, everyone believed and acted in conformance with that statement. Instead, Appellants point out some discrepancies in the actual year the conversation occurred. Elizabeth Kimball, the widow of Robert, testified that he was in Utah as often as "every couple of years" (T. p. 211). Not once does she or any other witness deny the statements attributable to Robert Kimball.

The unrefuted evidence demonstrates that Gilbert Kimball, not Robert, paid the taxes on this property in 1946 (Ex. 10, T. p. 119; Addendum 7) and ever since (T. p. 121). Contrary to Fletchers' assertion on page 12 of their Brief, the tax sale record of Summit County shows the sale to Gilbert Kimball in 1947 (Addendum 8). All of the assessor's plats show the property as being owned by Gilbert and/or Maud Kimball (Addendum 9, 10, 11). Robert Kimball stated on at least three occasions that the property was Gilberts and Robert didn't want anything to do with it (T. pp. 126-128, 156). There was no assertion by his Estate that he had any interest in this property at his death (C.A. Opinion, p. 3). In fact, Mel Fletcher offered to buy this property from Gilbert Kimball (T. p. 180), but is is submitted that he found another way to try and get it for nothing when he found the name of Robert Kimball on an old deed and went to Robert's widow

and obtained a Quit-Claim Deed. He did not pay Mrs. Kimball anything for the Deed. Also, Mr. Fletcher testified that he had the permission of Gilbert and Maud Kimball to use this property (T., p. 179).

The findings of the Court of Appeals applied the proper standard of review and were reasonable and in conformance with the evidence. The Court of Appeals found there was extensive and unrefuted evidence that Robert intended Gilbert and Maud Kimball to have the property (C.A. Opinion, p. 4). They also found the findings were "clearly erroneous" (C.A. Opinion, p. 5) and the "overwhelming evidence" demonstrated the use of the property by Fletchers was permissive (C.A. Opinion, p. 6). Further, the Court of Appeals noted that there was no explanation of why the Trial Court allowed counsel for Fletchers to change the property distribution and judgment (C.A. Opinion, p. 7, footnote 2) and Judge Orme, concurring specially, stated

> "I share Judge Davidson's puzzlement as reflected in footnote 2 of the main opinion . . . subsequently presented findings of fact and conclusions of law, insofar as different from such a ruling, are more a product of counsel's view of the case and sometimes his or her imagination."

The Trial Court's Opinion is both confusing and contrary to the evidence.

The evidence before the Court of Appeals demonstrates the errors made at the Trial Court level and that the decision was

contrary to the clear weight of the evidence, *Sharf v. BMG Corp.* 700 P.2d 1068 (Utah, 1985).

Point II

Laches Is A Proper Defense To This Action Where Fletchers And Their Predecessors Have Unreasonably Delayed in Bringing The Action

The Appellate Court found the unrefuted testimony was that it was Robert Kimball's intent that Gilbert and Maud Kimball retain ownership of this property (C.A., p. 4). "The Kimballs have relied on Robert's renouncement of interest in the property and on his continued silence and inaction to the time of his death." (C.A., Opinion, p. 5).

Fletchers rely on the case of *Beckstrom v. Beckstrom*, 578 P.2d 520 (Utah 1978). That case is inopposite to the facts presently before this Court. In *Beckstrom*,, the brother, Marion, lived on the property, did not remember disclaiming any interest in it, made the final mortgage payment, and the other co-tenant never made statement or took action to "bring home" to his brother that he challenged his ownership.

Contrary to that case, the fact that Gilbert and Maud Kimball were the only owners of this property had been brought home to Robert Kimball in the most obvious and long-term way and was acquiesced to by him. Robert never made any payments on the property or for taxes, never lived on the property and never disputed that Gilbert and Maud owned it. During the period of about 25 years, Gilbert and Maud paid all the taxes and conducted themselves as if they had sole ownership. If Appellant's position

that Robert had an ownership interest is correct, "his failure to claim the interest from Kimballs or to commence an action prior to his death must be considered unreasonable and prejudicial to the Kimballs" (C.A. Opinion, p. 4).

Further, his claim is barred by the statute of limitations. No action was brought within seven years of Robert's death. *Parr v. Zions First National Bank*, 13 U.2d 404, 375, P.2d 461 (1962).

Point III

The Court of Appeals Properly Found That Fletchers' Claim Was Barred By The Doctrine Of Estoppel

Appellants agree that in order to defeat the claim of a co-tenant, the claim must be brought home in a clear and unequivocal manner, *McCready v. Fredericksen*, 41 Utah 388, 126 P. 316 (1912); *Beckstrom v. Beckstrom*, 578 P.2d 520 (Utah 1978).

Without restating all of the facts found by the Court of Appeals, its Opinion summarized the evidence which establishes that Kimballs have met this standard and that Fletchers have no interest in the property (C.A. Opinion, p. 5):

> "The Kimballs have relied on Robert's renouncement of interest in the property and on his continued silence and inaction to the time of his death. Robert's successors in interest now repudiate his actions and claim that he continued to maintain his status as a co-tenant. There is little doubt that such repudiation is detrimental to the Kimballs. Because Gilbert and Maud believed Robert no longer desired an interest in the property, they did not pursue the matter further. If

> they had been given an indication of a change in Robert's position prior to his death, they could have attempted to obtain a conveyance from Robert, obtained an affidavit, or possibly brought a quiet title action. Robert's death rendered any further negotiations or contact with him impossible. Due to their reliance, the Kimballs found themselves in Court defending title to the property. Even had we not found laches to bar this claim, it would be barred by estoppel."

Robert Kimball unequivocally stated he wanted nothing to do with the property and the actions of all of the parties involved, including Robert Kimball's widow and Estate, confirm that that was both his intention and desire. He relinquishment of rights was brought home to everyone in the most obvious and continuous way possible.

Point IV

Permissive Use Defeats Any Claims By Fletchers For Prescriptive Rights To The Kimball Property.

As a secondary means to attempt to gather some rights across the Kimballs' property, the Fletchers have alleged they have a prescriptive right to use the property. The Appeals Court found, on page 6, that the "record contains overwhelming evidence which indicates that Fletchers had permission to use portions of this property." Without reiterating all of the facts in this case, it is clear that the Fletcher and Kimball families were friends and that all use of the Kimball property by any of the Fletchers was permissive. Because such use was permissive, no adverse or prescriptive rights can arise from that use. *Hammond v. Johnson,* 94 Utah 20, 66 P.2d 894 (1937).

Gilbert Kimball testified that Fletchers had permission to "use the ground" (T. pp. 28, 55). Mel Fletcher knew he had permission if Kimballs owned it (T. p. 179). Mr. Fletcher tried to buy it, by his own admission (T. p. 180). The two families were friends and Fletchers' family had permission, always from Maud Kimball (T. pp. 130-132). Mr. Fletcher's brother and sister knew the use was permissive (Addendum 5 and 6)

The finding of permissive use is overwhelmingly documented.

CONCLUSION

The Court of Appeals' ruling should be affirmed as entered.

RESPECTFULLY SUBMITTED this 30 day of August, 1989.

Robert Felton

ADDENDUM

1. Court of Appeals Opinion

2. Trial Court Ruling and Subsequent Judgment

3. Memorandum in Support of Motion to Amend Judgment

4. Decree of Distribution in the Estate of Robert Kimball

5. Statement of Consent by Mel Fletcher's Sister

6. Statement re: Consent by Mel Fletcher's Brother

7. 1942-1946 Tax Receipt to Gilbert Kimball

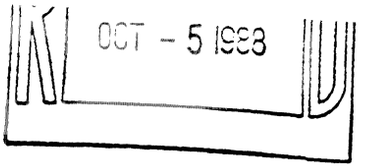
8. 1947 Tax Sale Record of Summit County to Gilbert Kimball

9. Summit County Ownership Plat for Gilbert Kimball

10. Summit County Ownership Plat for Gilbert and Maud Kimball

11. Summit County Ownership Plat for Gilbert and Maud Kimball

IN THE UTAH COURT OF APPEALS



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Sweeney Land Company, Plaintiff and Appellant, v. Gilbert and Maud Kimball, Defendants and Appellants, Melvin and Peggy Fletcher, Defendants and Respondents.	OPINION (Not For Publication)
Gilbert and Maud Kimball, Crossclaim Plaintiffs and Appellants, v. Melvin and Peggy Fletcher, Counterclaim-crossclaimants and Respondents.	Case No. 880080-CA

FILED

OCT 5 1988

Mary T. Noonan
Clerk of the Court
Utah Court of Appeals

Before Judges Davidson, Billings and Orme.

DAVIDSON, Judge:

This case involves conflicting claims to several small parcels of real property located in Park City, Utah. In 1980, the Sweeney Land Company (Sweeney) filed a complaint against Gilbert[1] and Maud Kimball (Kimballs) in addition to Melvin and Peggy Fletcher (Fletchers) seeking to quiet title to described land in Sweeney. The Fletchers counterclaimed and alleged they had possessed the property "openly, notoriously, and adversely for more than seven years and [they] have paid the taxes on the same for more than seven years." The Fletchers also claimed their use of the land gave them a "prescriptive right or incorporeal hereditaments to said lands.

---

1. Gilbert Kimball died during the course of litigation. The Kimballs were joint tenants in their property interests.

The Kimballs counterclaimed against Sweeney and crossclaimed against the Fletchers alleging they were the owners of the property as evidenced by a deed and, alternatively, by their adverse possession.

The Fletchers subsequently discovered Gilbert Kimball's deceased brother, Robert W. Kimball, allegedly held a cotenant interest in the property. Melvin Fletcher obtained a quit-claim deed from Robert's widow, Elizabeth, and then moved to amend the pleadings to claim a cotenant interest with the Kimballs and to request the property be partitioned. On February 22, 1984, the Fletchers tendered to the clerk of the court one-half the taxes on the property from 1942 to 1983 in view of their cotenant's interest. On August 1, 1984, Sweeney and the Fletchers filed a stipulation in which the two parties agreed to exchange quit-claim deeds concerning their respective interests in the parcels.

Trial to the court was held on September 5 and 6, 1985. A later hearing was held concerning objections to the proposed findings of fact, conclusions of law, and the judgment and decree of quiet title. Subsequently, the Kimballs and Sweeney moved for further amendments or for a new trial but were denied. We address only those issues which are dispositive.

Utah R. Civ. P. 52(a) requires that, "Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." We are bound to follow the rule together with the Utah Supreme Court's guidance, concerning the validity of findings of fact, in Acton v. Deliran, 737 P.2d 996, 999 (Utah 1987). This court will "accord conclusions of law no particular deference, but review them for correctness." Scharf v. BMG Corp., 700 P.2d 1068, 1070 (Utah 1985).

Fundamental to this opinion is our acceptance of the 1976 survey as the description of the property conveyed in the 1940 tax sale by Summit County to the brothers, Gilbert and Robert Kimball. The survey was executed by a licensed land surveyor who utilized the most accurate information then obtainable, whereas the 1940 tax deed is described in general terms.

ROBERT W. KIMBALL INTEREST

The Fletchers' claim is primarily based on the quit-claim deed obtained from Robert W. Kimball's widow, Elizabeth. For the quit-claim deed to have any validity, Robert must have been a cotenant with Gilbert until his death and Elizabeth must have

been Robert's successor in interest. There is no doubt that the brothers purchased the property in 1940. Elizabeth testified that Robert and she departed Park City in 1940 and never again resided in that location. Although Elizabeth stated Robert had not been in Utah during 1947 and 1953, she did testify that her late husband did make some visits.

Maud Kimball testified that taxes on the property for the years 1942 through 1947 were delinquent, but were redeemed by Gilbert Kimball who then made payment on the taxes until his death in 1983. She stated that neither Robert nor his estate made any contribution for property taxes. Maud further testified that she was present in 1940 or 1941 when Gilbert and Robert had a discussion relative to the property at issue. When Gilbert asked Robert "if he wanted to pay half of the tax," Robert is reported as saying, "Hell no, I want to get out of Park City. I want to move away, and I want nothing further to do with this." Maud also stated that the brothers discussed the property in 1947. Maud testified, "My husband Gilbert asked if [Robert] wanted to redeem himself and be put back for half of the taxes, and he said, no, I'm living in California now, and I still want nothing to do with it." When questioned about answers given in her deposition taken prior to trial, Maud attempted to clear up what appeared to be discrepancies concerning whether she heard the conversations between Gilbert and Robert. She also stated that Robert told the Kimballs to remove his name from the deed, but because he was on vacation, Robert would not go to the county seat and clarify the matter with a quit-claim deed.

Gary Kimball, a son of Gilbert and Maud Kimball, testified that, in about 1953, he was present when his father and his Uncle Robert discussed property in Park City. A portion of the conversation concerned the property at issue. When his father told Robert what he had done relative to redeeming the property, Gary stated, "[Robert] said it was fine with him. He was out of Park City. He was gone for good and had no more interests here

Gilbert Kimball's deposition was taken a few months prior to his death. In it he stated, "Long before my brother died he said he had nothing to do with this property. He refused to pay any part of the taxes on it, so we let the property go to taxes. And we bought it back in my name [in 1947]."

Attached to the notice of probate distribution recorded by the Fletchers' counsel was the decree of distribution concerning Robert's estate. Although the residuary clause refers to "any and all other property which may belong to said Estate, whether herein particularly mentioned or not," the section dealing with real property only refers to Robert's home in Salt Lake City.

The court found no evidence that the Kimballs ever gave notice to Robert of their intent to adversely possess the property. The court further found that Robert had never officially conveyed his interest to the Kimballs. However, the court made no findings concerning the extensive evidence showing Robert's intent that the Kimballs have the property. No evidence was presented in rebuttal.

The Kimballs assert that the claims of both the Fletchers and Sweeney are barred by the doctrines of laches and estoppel.

a. Laches

This doctrine was recently discussed in Borland By Dept. of Social Serv. v. Chandler, 733 P.2d 144, 147 (Utah 1987), where the court stated, "To successfully assert a laches defense, a defendant must establish both that the plaintiff unreasonably delayed in bringing an action and that the defendant was prejudiced by that delay." In Papanikolas Bros. Enter. v. Sugarhouse Shopping Center Assoc., 535 P.2d 1256 (Utah 1975), the court wrote:

> Although lapse of time is an essential part of laches, the length of time must depend on the circumstances of each case, for the propriety of refusing a claim is equally predicated upon the gravity of the prejudice suffered by defendant and the length of plaintiff's delay.

Id. at 1260 (footnote omitted).

If we assume Gilbert's redemption of the property in his name in 1947 and notification of such redemption to Robert no later than the mid-1950's as giving rise to a cause of action by Robert or his successors in interest, approximately 25 years passed before any complaint was filed. During this period, the Kimballs paid all the property taxes and conducted themselves as if they had sole ownership. If Robert believed he still possessed a cotenant interest, his failure to claim the interest from the Kimballs or to commence an action prior to his death must be considered unreasonable and prejudicial to the Kimballs. This claim is barred by laches.

b. Estoppel

Leaver v. Grose, 610 P.2d 1262, 1264 (Utah 1980), reports, "The doctrine of estoppel has application when one, by his acts, representations, or conduct, or by his silence when he ought to speak, induces another to believe certain facts exist and such other relies thereon to his detriment (footnote omitted)." Additionally, "The elements of equitable estoppel

are: 'conduct by one party which leads another party, in reliance thereon, to adopt a course of action resulting in detriment or damage if the first party is permitted to repudiate his conduct.'" Blackhurst v. Transamerica Ins. Co., 699 P.2d 688, 691 (Utah 1985)(quoting United American Life Ins. Co. v. Zions First Nat'l Bank, 641 P.2d 158, 161 (Utah 1985)).

The Kimballs have relied on Robert's renouncement of interest in the property and on his continued silence and inaction to the time of his death. Robert's successors in interest now repudiate his actions and claim that he continued to maintain his status as a cotenant. There is little doubt that such repudiation is detrimental to the Kimballs. Because Gilbert and Maud believed Robert no longer desired an interest in the property, they did not pursue the matter further. If they had been given an indication of a change in Robert's position prior to his death, they could have attempted to obtain a conveyance from Robert, obtained an affidavit, or possibly brought a quiet title action. Robert's death rendered any further negotiations or contact with him impossible. Due to their reliance, the Kimballs found themselves in court defending title to the property. Even had we not found laches to bar this claim, it would be barred by estoppel. The Fletchers cannot claim any interest in the property because of the quit-claim deed from Robert's widow, Elizabeth.

ADVERSE POSSESSION

The court found that the Fletchers' use of a portion of the property was adverse to the Kimballs. Specifically, the trial court found the Fletchers' use "was not under any agreement or permission from any person or entity." We disagree. To hold a finding of fact to be clearly erroneous requires "that if the findings . . . are against the clear weight of the evidence, or if the appellate court otherwise reaches a definite and firm conviction that a mistake has been made, the findings . . . will be set aside." State v. Wright, 744 P.2d 315, 317 (Utah App. 1987)(quoting State v. Walker, 743 P.2d 191, 193 (Utah 1987)).

In Olwell v. Clark, 658 P.2d 585 (Utah 1982), the court wrote:

> [I]n order to show successful adverse possession, the claimant must intend to acquire title, must by declaration or conduct give actual or constructive notice to the legal title holder, and must possess the property in a manner variously called "open," "notorious," or "hostile" for a period of seven years. . . . It is

> generally agreed that, in order for the claimant's conduct to give notice, it must be conduct that is inconsistent with the rights of the owner.

Id. at 587 (citation omitted).

Adverse possession cannot arise from use by the claimant with the permission of the legal title holder. Hammond v. Johnson, 94 Utah 20, 66 P.2d 894 (1937). The record contains overwhelming evidence which indicates the Fletchers had permission to use portions of the property. Gilbert, in his deposition, states that Melvin Fletcher's father, Roy, had asked him for permission "to use the ground." The permission was granted as long as the Kimballs "had no use for it." Gilbert further claimed that Roy believed he owed Gilbert rent which the latter refused to accept. The deposition asserts that Gilbert offered to sell Melvin the property, but the two never agreed on a price. Gilbert's deposition refers to an exhibit which is a statement written by Juanita Fletcher Love, Roy's daughter and Melvin's sister. The statement reflects Juanita's understanding that a portion of the property in dispute belonged to Gilbert and was used with his permission. Additional mention is made of another exhibit which was also received by the trial court, a statement by Marion Fletcher, Roy's son and Melvin's brother. This statement indicates that Roy's use of the Kimball property was subject to Gilbert's revocable permission. Maud testified that the Fletcher family always had permission to use a portion of the Kimball property. Gary Kimball testified he was present when his father, Gilbert, discussed the property with Melvin and the latter made an offer of approximately $90,000 - $96,000 for it. Also, Melvin Fletcher testified, when asked if his family had the permission of the Kimball family to go across the property, "In a sense, yes, if they [the Kimballs] owned the ground." Melvin's testimony reveals he offered Gilbert $60,00(for the property, but had been refused. This evidence shows that Melvin's use of the Kimball property was with consent. We, therefore, hold that the finding of adverse possession, or conduct inconsistent with the rights of the Kimballs, is against the clear weight of the evidence.

The Fletchers have acquired no interest in the Kimball property at issue either through the quit-claim deed from Elizabeth or under the doctrine of adverse possession. The case is remanded to the trial court for entry of judgment

consistent with this opinion.[2] Any Sweeney claims that are based on deeds received from the Fletchers and concern the Kimball property, must fail. Title to that property is quieted in the Kimballs. There appears to be no reason why the deeds between Sweeney and the Fletchers, not affecting the Kimball property, should not stand, although the trial court should examine this on remand. Each party will bear their own costs on appeal.

This opinion is not regarded as adding anything significant to existing law. Additionally, the fact situation is so complex that the case might prove confusing to any reader. For these reasons this opinion is not to be published in the Utah or Pacific Reporters.

Richard C. Davidson, Judge

I CONCUR:

Judith M. Billings, Judge

ORME, Judge: (concurring specially)

I agree that this difficult case should be remanded, although I am not prepared to go as far as my colleagues in defining what the outcome on remand should be.

---

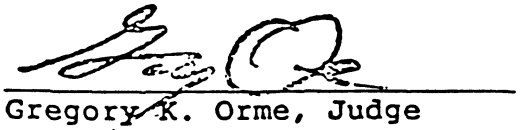
2. We find it difficult to follow from the record why the trial court signed the judgment and decree of quiet title which does not comport with its oral ruling. We realize the trial court heard objections to the findings of fact, conclusions of law, and the judgment and decree, but there is nothing before us to indicate why the changes from the oral ruling were made.

As concerns the issue of Robert Kimball's widow's curious conveyance to Melvin Fletcher, I also see error in the trial court's not making findings "concerning the extensive evidence showing Robert's intent that the Kimballs have the property." While the majority's analysis of the two doctrines is sound, I am not, however, persuaded that the evidence shows as a matter of law that the Fletchers' claim is barred by laches and/or estoppel. As to this part of the dispute, I would simply remand with instructions that the trial court make findings relative to Robert's comments and conduct and draw any appropriate legal conclusions concerning laches and estoppel from those findings.

I concur in Judge Davidson's opinion insofar as it concerns the adverse possession issue and the treatment to be accorded on remand to the deeds between Sweeney and the Fletchers.

I share Judge Davidson's puzzlement as reflected in footnote 2 of the main opinion. While it is true that "[a]ny judge is free to change his or her mind on the outcome of a case until a decision is formally rendered," Bennion v. Hansen, 699 P.2d 757, 760 (Utah 1985), the court's ruling from the bench, fresh on the heels of trial, is a product of the court's own mental impressions and contemporaneous, neutral assessment of the evidence. Subsequently presented findings of fact and conclusions of law, insofar as different from such a ruling, are more a product of counsel's view of the case--and sometimes of his or her imagination. While a court has every right to alter its perception of a case, it should take pains to explain fully any differences between its "untainted" ruling from the bench and its formal decree.

Finally, I would order counsel not to disclose this case to the Bar Examiner Committee of the Utah State Bar. They would be unable to resist fashioning the next Bar exam's real property question after the facts of this case--and such would clearly violate the Bar applicants' rights under the eighth amendment to the United States Constitution.



Gregory K. Orme, Judge

ORIGINAL

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SUMMIT COUNTY, STATE OF UTAH

SWEENEY LAND COMPANY, PLAINTIFF, VS. GILBERT AND MAUD KIMBALL, HIS WIFE, ET AL. DEFENDANTS.	:	CIVIL NO. 6211

FILED

OCT 11 1985

Clerk of Summit County

Deputy Clerk

BEFORE THE HONORABLE J. DENNIS FREDERICK, JUDGE

REPORTER'S TRANSCRIPT OF COURT'S RULING

SEPTEMBER 6, 1985

APPERANCES:

FOR PLAINTIFF:

PAUL VEASY
EDWARD S. SWEENEY
BIELE, HASLAM & HATCH
80 WEST BROADWAY, SUITE 300
SALT LAKE CITY, UTAH 84101

FOR DEFENDANT KIMBALL:

ROBERT FELTON
ATTORNEY AT LAW
324 SOUTH STATE STREET, SUITE 220
SALT LAKE CITY, UTAH 84111

FOR DEFENDANT FLETCHER:

GERALD H. KINGHORN
ATTORNEY AT LAW
TEN EXCHANGE PLACE, SUITE 1000
SALT LAKE CITY, UTAH 84111

CLAIM TO THE HERCIHISER PARCEL IS SUPERIOR TO THAT OF THE PLAINTIFF. TITLE TO THAT PARCEL IS QUIETED IN THE PLAINTIFF.

AS TO THE PRINCIPAL KIMBALL PARCEL, IT IS THE LAW IN UTAH THAT CO-TENANTS IN REALITY STAND IN A UNIQUE RELATIONSHIP OF CONFIDENCE AND TRUST BY REASON OF THEIR COMMUNITY OF INTERESTS. THIS RELATIONSHIP MAKES IT PARTICULARLY DIFFICULT FOR A PARTY TO CLAIM ADVERSE POSSESSION AGAINST HIS CO-TENANT. THE CO-TENANT'S INTEREST MUST BE DISAVOWED BY THE ACTS OF THE MOST OPEN AND NOTORIOUS CHARACTERS WHICH SHOW CLEARLY TO THE WORLD THE CLAIMANT'S INTENTION TO EXCLUDE THE RIGHTS OF THE CO-TENANTS. THERE IS A HIGHER STRICTER STANDARD OF NOTICE TO HIS CO-TENANT COMMENSURATE WITH HIS POSITION OF TRUST. PAYMENT OF TAXES BY ONE CO-TENANT INURES TO THE BENEFIT OF ALL, OR BOTH IN THIS CASE, CO-TENANTS, CREATING A RIGHT OF REIMBURSEMENT ONLY. MCCREADY V. FREDERICKSEN, 41 UTAH 388, AND SEVERAL CASES SINCE AND UP TO AND INCLUDING THE CASE OF OLWELL V. CLARK, 658 P.2D 585, 1982. THE EVIDENCE, IN MY JUDGMENT, HAS FAILED TO ESTABLISH THAT THE CO-TENANCY BETWEEN ROBERT AND GILBERT KIMBALL WAS TERMINATED. ACCORDINGLY, DEFENDANTS FLETCHER CLAIMING THROUGH ELIZABETH KIMBALL DEED, EXHIBIT 17, ARE DECLARED TO BE CO-TENANTS WITH MAUD KIMBALL IN THE PRINCIPAL KIMBALL PARCEL.

IT IS FURTHER DETERMINED THAT SAID PARCEL SHOULD BE AND THEREFORE IS PARTITIONED. THE NORTHERN ONE-HALF

TO THE DEFENDANTS FLETCHER FREE AND CLEAR OF ANY CLAIM OF THE DEFENDANTS KIMBALL, AND THE SOUTHERN ONE-HALF TO THE DEFENDANTS KIMBALL FREE AND CLEAR OF ANY CLAIM OF THE DEFENDANTS FLETCHER. DEFENDANT KIMBALL IS TO BE REIMBURSED FOR THE ONE-HALF OF THE TAXES PAID BY SHE AND HER HUSBAND AS TENDERED TO THE CLERK OF THE COURT. EACH PARTY IN THIS CASE IS TO BEAR THEIR OWN ATTORNEY'S FEES AS WELL AS COSTS.

MR. KINGHORN, WILL YOU PREPARE THE FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECREE, PURSUANT TO RULE 4?

MR. KINGHORN: YES, YOUR HONOR, I WILL.

THE COURT: ARE THERE ANY QUESTIONS, GENTLEMEN?

VERY WELL. COURT WILL BE IN RECESS.

MR. FELTON: THANK YOU.

(PROCEEDINGS CONCLUDED.)

GERALD H. KINGHORN
KAPALOSKI, KINGHORN & PETERS
Attorney for Melvin and Peggy Fletcher
9 Exchange Place, Suite 1000
Salt Lake City, Utah 84111
Telephone: (801) 364-8644

IN THE THIRD DISTRICT COURT FOR

SUMMIT COUNTY, STATE OF UTAH

NO.....

FILED

NOV 5 1985

Clerk of Summit County

BY.....
Deput Clerk

SWEENEY LAND COMPANY, Plaintiff, vs. GILBERT and MAUD KIMBALL et al., Defendants.	JUDGMENT AND DECREE OF QUIET TITLE
GILBERT and MAUD KIMBALL, Crossclaim Plaintiffs, vs. MELVIN FLETCHER and PEGGY FLETCHER, et al., Counter-Crossclaimants.	Civil No. 6211

Based upon the Findings of Fact and Conclusions of Law on file herein and good causing appearing therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. Title is quieted in Sweeney Land Company as to the following:

Parcel 1: Beginning at a point North 28°50' West 79.5 feet from the Southwest corner of Block 53, Snyder's Addition to Park City and running, thence North 61°14'19" East 99.03 feet, thence South 28°50' East 15.00 feet, thence South 61°14'19" West 99.03 feet to the Easterly side line of Park Avenue, thence North 28°50' West 15.00 feet, more or less, to the point of beginning.

Parcel 2: A 50% undivided interest in the parcel described as follows: Beginning at a point which is North 28°45'41" West, 64.5 feet and North 61°14'19" East 99.03 feet from the S.W. corner of Block 53, Snyders Addition to Park City, thence North 28°45'41" West 15.00 feet, thence North 61°10' East 33.90 feet; North 28°50' West 30.00 feet, thence North 64°11' East 17.00 feet, thence South 43°13' East 44.50 feet, more or less, to the Northeast corner of the parcel decreed to Melvin Fletcher and Peggy Fletcher herein, thence South 61°14'19" West 62.00 feet, more or less, along the North line of the land decreed to Melvin Fletcher and Peggy Fletcher herein to the point of beginning.

2. Title is quieted in the Defendant Maud Kimball as her sole and separate property to the following parcel of land.

Parcel 1: Beginning at a point North 23° 38' West 85.97 feet and North 33° 25' West 46.7 feet from the Southeast corner of Block 7, amended plat of Park City, Utah in Section 16, Township 2 South, Range 4 East, Salt Lake Base and Meridian, thence South 61° 10' West 73.16 feet, thence North 28° 50' West 55.7 feet, thence North 61° 10' East, 70 feet more or less, thence South 33° 25' East, 58 feet more or less to the point of beginning.

Parcel 2: A 50% undivided interest in the parcel described as follows: Beginning at a point which is North 28°45'41" West, 64.5 feet and North 61°14'19" East 99.03 feet from the S.W. corner of Block 53, Snyders Addition to Park City, thence North 28°45'41" West 15.00 feet, thence North 61°10' East 33.90 feet; North 28°50' West 30.00 feet, thence North 64°11' East 17.00 feet, thence South 43°13' East 44.50 feet, more or less, to the Northeast corner of the parcel decreed to Melvin Fletcher and Peggy Fletcher herein, thence South 61°14'19" West 62.00 feet, more or less, along the North line of the land decreed to Melvin Fletcher and Peggy Fletcher herein to the point of beginning.

3. Title is hereby quieted and Melvin Fletcher and Peggy Fletcher as their sole and separate property in and to the following land:

Beginning at a point North 23°38' West 85.97 feet and North 33°25' West 46.70 feet from the Southeast corner of Block 7, Amended plat of Park City in Section 16 Township 2 South, Range 4 East, Salt Lake Base and Meridian, and South 61°10' West, 73.16 feet and North 28°50' West 55.7 feet to the true point of beginning;

Thence along the following courses and distances: North 28°50' West along the East boundary of the land

conveyed to Melvin Fletcher by Mary Workman a distance of 60.6 feet, thence North 61°10' East 61.93 feet, thence South 43° 13' East 15 feet, thence South 33°25' East 47.6 feet more or less, thence South 61°10' West 70 feet more or less to the true point of beginning.

Each party is to bear their own costs and attorneys fees.

DATED this 28 day of ~~October,~~ Nov. 1985.

BY THE COURT:

J. Dennis Frederick
District Judge

Robert Felton, 1056
5 Triad Center
Suite 585
Salt Lake City, Utah 84180
Phone: (801) 359-9216
Attorney for Defendants
and Crossclaim Plaintiffs

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR
SUMMIT COUNTY, STATE OF UTAH

* * * * * * * * *

SWEENEY LAND COMPANY, Plaintiff, vs. GILBERT and MAUD KIMBALL, et al Defendants.	MEMORANDUM IN SUPPORT OF MOTION FOR NEW TRIAL OR TO AMEND JUDGMENT Civil No. 6211 Judge J. Dennis Frederick
GILBERT and MAUD KIMBALL, Crossclaim Plaintiffs, vs. MELVIN FLETCHER and PEGGY FLETCHER, et al., Counterclaim-Crossclaimants.	

* * * * * * * * *

Robert Felton, attorney for Kimballs, hereby submits this Memorandum in support of his Motion for a New Trial filed in the above-entitled action.

JUDGMENT AND FINDINGS SIGNED BY THE COURT

FAIL TO REPRESENT THE COURT'S RULING

Kimballs, by and through their attorney, hereby move this Court that a new trial be granted for and on the ground that the Findings and Judgment are in such disarray and contrary to the

ruling of this Court that substantial justice demands a new trial. The Judgment and Findings which were submitted by counsel for Fletchers do not reflect the ruling of this Court and it is submitted that counsel's alteration of the ruling is, in and of itself, persuasive evidence of the error in this Court's ruling.

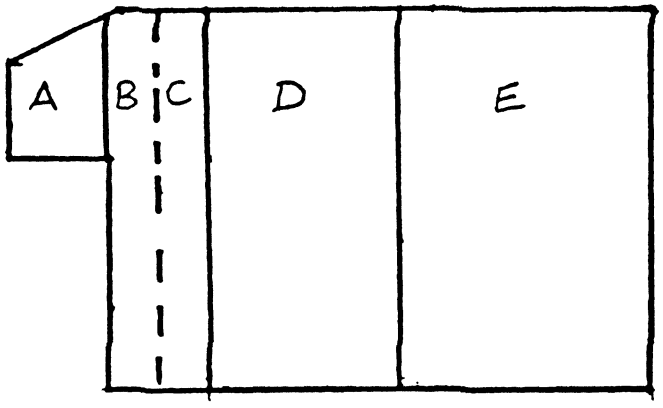
On Page 3 of this Memorandum are two diagrams which roughly delineate the property addressed after the trial in this action. The top diagram describes the distribution of the property in accordance with the Recorder's transcript of the Court's ruling dated September 6, 1985.

The lower diagram describes the property distribution as reflected by the Judgment and Findings executed by the Court.

As can be clearly seen, the distribution of Parcels "A" and "B" on the attached diagram differ significantly from the conclusion at trial and that reflected in the written Judgment.

In addition to the differences between the Ruling and the written Judgment, either distribution of the property is so fatally flawed as to require a new trial. At the commencement of the trial both counsel for Sweeny and counsel for Fletchers stated that they made no claim to Parcel "A", the Hersheiser Parcel, and counsel for Kimballs moved for an Order quieting title in that parcel to them. The Court denied the Motion with leave to reconsider it after hearing the evidence (Findings of Fact Pg. 2).

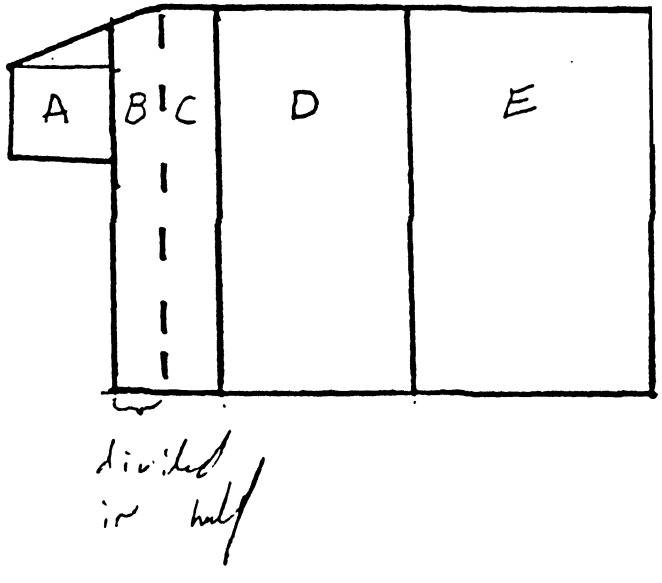
In the Judgment of the Court the parcel of property to which neither Sweeney nor Fletcher claimed any interest was awarded in one case 100% to Sweeneys and in the other case (written



A - Hersheiser Parcel
& C - 30' Strip
& E - Kimball Parcel

RULING FROM THE BENCH

A - Sweeney 100%
B - Fletcher 100%
C - Fletcher 100%
D - Fletcher 100%
E - Kimball 100%



WRITTEN JUDGMENT

A - Sweeney 50%; Kimball 50%
B - Sweeney 50%; Kimball 50%
C - Fletcher 100%
D - Fletcher 100%
E - Kimball 100%

Judgment) divided 50% to Sweeney and 50% to Kimball. Not only was there no evidence submitted by Sweeney as to ownership of this parcel of property, they expressly never claimed an interest in it yet the ruling awards it to them anyway.

The written judgment awards the northern half of the 30 foot strip designated on the diagram as Parcel "B" 50% to Sweeneys and 50% to Kimballs, yet Kimballs' claim to the entire 30 foot strip (Parcels "C" and "B") is exactly the same. There is no evidence nor justification to somehow delineate Parcels "B" and "C" and it is submitted that if Kimball maintain a 50% interest in Parcel "B" then they should also have a 50% interest in Parcel "C".

THE COURT APPLIED THE WRONG BURDEN OF PROOF AND LAW AND SAID APPLICATION WAS ARBITRARY AND CAPRICIOUS

The ruling of the Court from the bench set forth that Fletchers, by a preponderance of the evidence, used the 30 foot strip adversely against Kimballs. In the next paragraph, at least as to the main parcel of property, the Court states that the Kimballs have failed to satisfy their burden of proof against a co-tenant as set forth in Olwell v. Clark 658 P.2d 585 (1982). The claim which Fletchers assert to Parcels "B" and "C" (the 30 foot strip) arises directly out of their claim of co-tenancy with Kimballs. That co-tenancy cannot be terminated unless it meets the higher standards set forth in Olwell supra.

The Notice of Probate Distribution filed by Mr. Kinghorn described the entire parcel of property (Parcels "A", "B", "C", "D" and "E") demonstrating a clear position that Fletchers'

interest was claimed to be as a co-tenant and the ruling applies the stricker standard against Kimball while ignoring the relationship in distributing the other parcels. The Findings of Fact (Paragraph 8) also asserts that the entire parcel is the property deeded to Kimballs in 1940.

These facts considered in conjunction with those cited earlier demonstrate that the ruling is so confused and the law has been applied so randomly that a new trial is the only logical way to straighten out the ownership of this property and place it in the proper hands.

THE COURT MISAPPREHENDED THE LAW REGARDING ADVERSE POSSESSION AND PRESCRIPTIVE EASEMENT

In its ruling from the bench, this Court stated that the only difference between adverse possession and a prescriptive easement was the length of time each took to vest (excluding payment of taxes). This misapprehension of the law of this State is a major error in the ruling. The Court's ruling stated that Fletchers received title to the 30 foot strip (even though that is changed in the written judgment). There is no dispute that Fletchers paid no taxes on the property and, therefore, cannot acquire title by adverse possession as set forth in § 78-12-12 U.C.A. (1953).

Since there can be no adverse possession in Fletchers, the only right which can be acquired is one by prescription. The Court's ruling quieted title in the 30 foot strip to the Fletchers, it did not grant them an easement across it. The

Court has, very simply, confused the acquisition of title pursuant to the adverse possession statute with the right of use as against the fee title holder acquired by continuous years of use. The Court has granted fee title in Fletchers which is impossible under the Doctrine of Prescription.

It is further submitted that the only evidence as to use of the 30 foot parcel by Fletchers which can conceivably be construed to meet the requirements of prescriptive easement (excluding the issue of co-tenancy) was for a driveway accessing the rear of his house. The evidence and plat submitted into evidence clearly delineates the alleged driveway as being eight feet wide. The easement, if any, cannot be expanded by Order of this Court and must be confined to its historical existence.

Kimballs submit that the finding of an easement is not supported by the evidence but, if the Court sustains itself, that the easement can only be eight feet wide and used for a driveway because that is the size and use established historically. McBride v. McBride 581 P.2d 996 (Utah 1978).

THE EVIDENCE DOES NOT SUPPORT THE COURT'S VERDICT

Counsel for Kimballs admits some confusion in the application of the facts and the conclusions drawn by the Court. At the hearing before this Court on November 4, 1985, it was stated that the Court would execute the written documents submitted by counsel for Fletchers. This was done in spite of the fact that the written Judgment significantly alters the ruling of the Court and is not in conformance therewith. The

evidence as a whole does not support the Court's ruling either from the bench or the written form. A different standard of proof was applied in the termination of the co-tenancy between Kimball and Fletcher as to Kimballs' interest but was not applied to Fletchers' interest. Fee title was granted to a 30 foot strip when only an easement was proven and the distribution of the property is not supported by the evidence.

The Court's ruling fails to address the easement claimed by Kimballs over the 30 foot strip. If Fletchers have an easement to the 30 foot strip north of the Kimball parcel then the issue of the prescriptive use of the remaining parcel up to Park Avenue must be addressed. This is especially true in light of the findings and allegation that Fletchers and Kimballs are co-tenants. If they are co-tenants then Kimballs should also have such an easement.

CONCLUSION

There is no doubt that this is a complicated case involving a lot of different descriptions and uses of property over a great number of years. The resolution of the dispute, however, has been further complicated by three significant factors:

1. The written Judgment and Findings significantly changes the property distribution that the Court made at the time of trial,

2. The burden of proof and standard of care as between co-tenant has been misapplied, and

3. The Court has misapprehended the applicable law as quiet title actions and adverse use.

It is submitted to this Court that there is one apparen fact that stands out at the conclusion of these proceedings That fact is that everyone, including the Court, appear confused.

It is respectfully submitted that the only way to unwin this web of confusion and at the same time do substantial justic to all parties is to grant a new trial where the parties ca present their proof and clarify the confusion which has arise from these initial proceedings.

This is a very valuable piece of property located next to ski lift in Park City and the parties deserve a resolution whic is, to the best of everyone's ability, fair and in accordanc with the applicable law. It is submitted that the situation a it exists now does not rise to that standard.

RESPECTFULLY SUBMITTED this 14 day of November, 1985.

Robert Felton

MAILING CERTIFICATE

I certify that I mailed a true and correct copy of th foregoing MEMORANDUM IN SUPPORT OF MOTION FOR NEW TRIAL OR T AMEND JUDGMENT postage prepaid, to Paul Veasey, 50 West Broadway 4th Floor, Salt Lake City, Utah 84101, Gerald Kinghorn, 1 Exchange Place, Suite 1000, Salt Lake City, Utah 84111 o this 15 day of September, 1985.

GERALD H. KINGHORN
KAPALOSKI, KINGHORN & PETERS
Attorney for Melvin and Peggy Fletcher
9 Exchange Place, Suite 1000
Salt Lake City, Utah 84111
Telephone: (801) 364-8644

IN THE THIRD DISTRICT COURT FOR

SUMMIT COUNTY, STATE OF UTAH

SWEENEY LAND COMPANY, Plaintiff, vs. GILBERT and MAUD KIMBALL et al., Defendants.	ORDER DENYING MOTIONS FOR NEW TRIAL AND TO ALTER OR AMEND THE JUDGMENT
GILBERT and MAUD KIMBALL, Crossclaim Plaintiffs, vs. MELVIN FLETCHER and PEGGY FLETCHER, et al., Counter-Crossclaimants.	Civil No. 6211

The motion of the Defendant Kimball and the Plaintiff for a new trial or in the alternative to alter or amend the judgment came on regularly for hearing on December 2, 1985 at 10:00 a.m. before the Honorable J. Dennis Frederick, Judge at the District Courtroom, Summit County Courthouse, Coalville, Utah. Counsel for the Defendant Kimball, Robert Felton, Counsel for the Plaintiff Sweeney Land Company, Paul Veasy and Counsel for Melvin and Peggy Fletcher, Gerald H. Kinghorn were present.

EXHIBIT "B"

The Court heard the arguments for and in opposition to the motions, and upon being fully advised it is hereby ordered that each motion be and the same hereby are denied.

DATED this _____ day of January, 1986.

BY THE COURT

J. Dennis Frederick
District Judge

CERTIFICATE OF MAILING

I HEREBY CERTIFY that a true and correct copy of the foregoing ORDER DENYING MOTION FOR NEW TRIAL AND TO ALTER OR AMEND THE JUDGMENT was mailed, postage prepaid, to the following on this 2 day of January, 1986.

Robert Felton
5 Triad Center, Suite 585
Salt Lake City, Utah 84180

Paul Veasy
50 West Broadway
4th Floor
Salt Lake City, Utah 84111

Robert H. Ruggeri, Esq.
Attorney for Executrix
Office and Post Office Address:
59 East Center Street
Box 310, Moab, Utah 84532
801-259-5611

IN THE THIRD JUDICIAL DISTRICT COURT,

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

In the Matter of the Estate of ROBERT W. KIMBALL, also known as ROBERT KIMBALL, also known as ROBT. W. KIMBALL, and being one and the same person, Deceased.	PROBATE NO. 62327

DECREE OF DISTRIBUTION

ELIZABETH W. KIMBALL, Executrix of the Estate of Robert W. Kimball, also known as Robert Kimball, also known as Robt. W. Kimball, and being one and the same person, and hereinafter for convenience referred to as Robert W. Kimball, deceased, having on the 28 day of January, A. D., 1976, filed in this Court her Petition, setting forth, among other things, that all accounts in said Estate have been paid and finally settled; that said Estate is now in a condition to be closed; that a portion of said Estate remains to be distributed and Petitioner prays therein that the residue and the whole of said Estate be distributed to Elizabeth W. Kimball, the person entitled to receive the entire and whole of said Estate, and said matter coming on regularly to be heard this 11 day of February, A. D., 1976, this Court proceeds to the hearing of said Petition.

It appearing to the satisfaction of this Court that the Clerk duly fixed the time and place for the hearing of said Petition and gave due notice thereof as required by law; that all Accounts have been fully settled; that all taxes against the property of said Estate have been paid; that there is no inheritance tax due and

owing from the said Estate to the State of Utah, nor to the United States of America; that the residue of said Estate, and the whole thereof, consisting of the real and personal property hereinafter particularly described and referred to, is now ready for distribution.

And it further appearing to the Court that Robert W. Kimball, deceased, died testate on the 20th day of March, A. D., 1975 at Salt Lake City, Salt Lake County, State of Utah; that said deceased at the time of his death was a resident of Salt Lake City, Utah; that said deceased left surviving him as his sole legatee and devisee under his Last Will and Testament, his wife, Elizabeth W. Kimball, now residing at 2283 Garfield Avenue, Salt Lake City, Utah 84108.

And it further appearing to the Court that the said Elizabeth W. Kimball is now the owner of the whole of said estate and is entitled, therefore, to have the entire residue and the whole of said estate distributed to her.

Now, on this 11 day of February, A. D., 1976, on motion of Robert H. Ruggeri, Attorney for said Executrix, and no objection being made thereto, and there being no objection on file,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

That the residue and the whole of the Estate of Robert W. Kimball, deceased, hereinafter particularly described and set forth and now remaining in the hands of said Executrix, together with any and all otherproperty which may belong to said Estate, whether herein particularly mentioned or not, or in which said Estate may have any interest, be, and the same is, hereby distributed to Elizabeth W. Kimball, now residing at 2283 Garfield Avenue, Salt Lake City, Utah 84108.

The following is a particular description of said residue of said Estate referred to in this Decree and of which distribution is ordered, adjudged and decreed, as aforesaid, to-wit:

REAL PROPERTY:

All of Lot 41, Bonneville Garden Second Addition, according to the official plat thereof in Salt Lake County, State of Utah

PERSONAL PROPERTY:

1966 Chevrolet 4 door automobile bearing Serial No. 27063

Savings Account 701 1011819 in the amount of $7,399.07 with Prudential Federal Savings and Loan Association, Salt Lake City, Utah.

Savings Certificate No. 1787 with Prudential Federal Savings and Loan Salt Lake City, Utah 701-0178712 $7,878.19

200 shares of Silver King Mining Company
70 shares of American Mutual Building and Loan Company
267 shares of American Savings & Loan Association
5100 shares of Tenabo Consolidated Mines Company
100 shares of Trappers Price Mining Company
1330 shares Tintic Coalition Mines Company
1000 shares of Howell Mining Company
500 shares of Combined Metals, Incorporated
200 shares Intermountain Petroleum Company
4000 shares Flagastaff Bonanza Mining Co.
500 shares Three Kings Consolidated Mining Co.
3000 shares Spring Valley Mining Company
1000 shares Tuma Corporation of Nevada.

Dated this 11 day of January, A. D., 1976.

ATTEST
W. STERLING EVANS
CLERK
BY _____
Deputy Clerk

_____
JUDGE

STATE OF UTAH)
COUNTY OF SALT LAKE) ss.

I, THE UNDERSIGNED, CLERK OF THE DISTRICT COURT OF SALT LAKE COUNTY, UTAH, DO HEREBY CERTIFY THAT THE ABOVE AND FOREGOING IS A TRUE AND FULL COPY OF THE ORIGINAL DOCUMENT ON FILE IN MY OFFICE AS SUCH CLERK.

WITNESS MY HAND AND SEAL OF SAID COURT THIS 20 DAY OF May 19 76

H DIXON HINDLEY, CLERK
BY _____ DEPUTY

To whom it may concern.

As far as my knowledge in growing up; it was understood that our back entrance always belonged to Gib Kimball and he gave my Dad, Roy Fletcher, permission to use it.

Juanita Fletcher
nee

17829-33N. E.
Seattle, Wa.
98155

206-363-0797

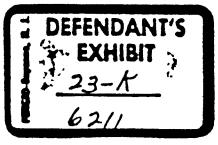


EXHIBIT "A"

To Whom It May Concern:

I, Marion G. Fletcher, of Salt Lake City, Utah, do hereby declare that I am the son of Roy Fletcher, formerly a resident of Park City, Utah. This document relates to property of Roy Fletcher known as the Park Avenue property.

During the lifetime of my father, I had discussions with him regarding this Park Avenue property and the use by him of the adjacent Kimball property. The legal description and a pictorial survey of the Kimball property is displayed on the page attached hereto. My father acknowledged the ownership of the Kimball property by Gilbert John Kimball and Maude S. Kimball, his wife, having stated that his use of the roadways and buildings and his use of the Kimball property was by permission of Gilbert J. Kimball under a revokable agreement my father had worked out with him. The above recitation has also always been my understanding of the matter.

It was my father's understanding that at any time Gilbert J. Kimball would request, the improvements placed on the Kimball property would be subject to removal by my father without compensation, and use of the Kimball property discontinued.

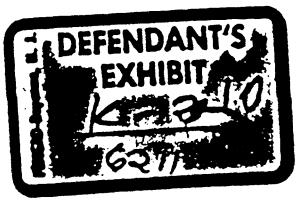
Dated this 26 day of July, 1980.

Marion G. Fletcher
MARION G. FLETCHER

Signed and delivered
in the presence of:

Lisa Hitchins

Gilbert J. Kimball



TREASURER'S OFFICE

SUMMIT COUNTY, UTAH

Tax Payer No. 6004

Coalville, Utah, March 2, 19A

Received of William J. Kimball $123.9

[illegible] Dolla

the same being paid to redeem from tax sale the following described premises situated in Summit County, State of Utah, to wi

[illegible]

a certain sale thereof for delinquent taxes having been made by the Treasurer of Summit County on [illegible] 10, 19A

to said county for taxes delinquent November 10, 19A1 District [illegible]

Year	General Taxes	State Bounty	T.B.I.	State Inspection Fund	Penalty, Costs and Interest	Year Totals	Final Total
19 A1	1,200				1 32	2 9 59	
19 A2	11 19				47	1 1 66	
19 A3	2,5 32				76	2 6 08	
19 A4	2,2 51				82	2 9 39	
19 A5	2,6 11				77	2 6 77	1 0 2 9

TAX SALE RECORD

PAGE 103

NAME AND ADDRESS OF OWNER: Kimball, Gilbert J.

DESCRIPTION OF PROPERTY: 98 x 77 of Blk 53 S.A.

TAXING DISTRICT: Park City

DATE OF PRELIMINARY SALE: Jan 11, 1933

AREA: 98 x 77 in S.A.

TAXES ALL YEARS CREDIT	TAXES ALL YEARS BALANCE	DATE	EXPLANATION	POSTING REFERENCE	DELINQUENT 19 32 TAXES BOOK A PAGE 98 LINE 1 DEBIT	CREDIT	BALANCE	DELINQUENT 19 33 TAXES BOOK A PAGE 39 LINE 33 DEBIT	CREDIT	BALANCE	DELINQUENT 19 34 TAXES BOOK A PAGE 93 LINE 39 DEBIT	CREDIT	BALANCE	DELINQUENT 19 35 TAXES BOOK A PAGE 98 LINE 39 DEBIT	CREDIT	BALANCE	DELINQUENT 19 36 TAXES BOOK A PAGE 99 LINE 36 DEBIT	CREDIT	BALANCE
			Gen Tax		2827			1149			25 32			28 57			26 00		
			Cost & Adv		75			25			26			25			25		
			Pen		57		2959	22		1166	51		26 09	57		29 29	52		24 77

ASSIGNED TO / REDEEMED BY: Gilbert J. Kimball — ADDRESS — DATE: Mch 3 1937 — CERTIFICATE NUMBER: 6004

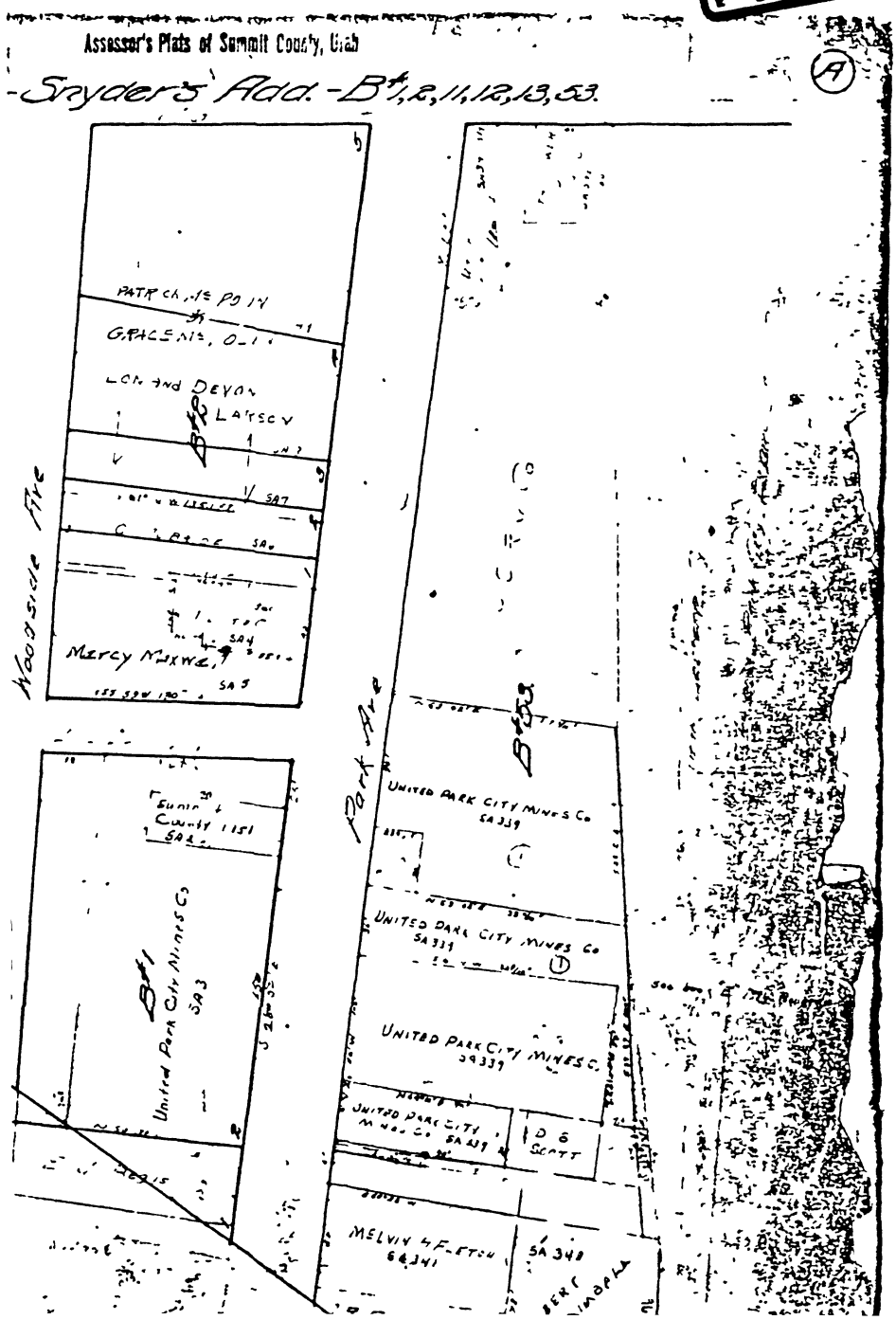
Non assessment: Mch 1937

AUDITOR'S ENDORSEMENT OF TAX DEED PROPERTY

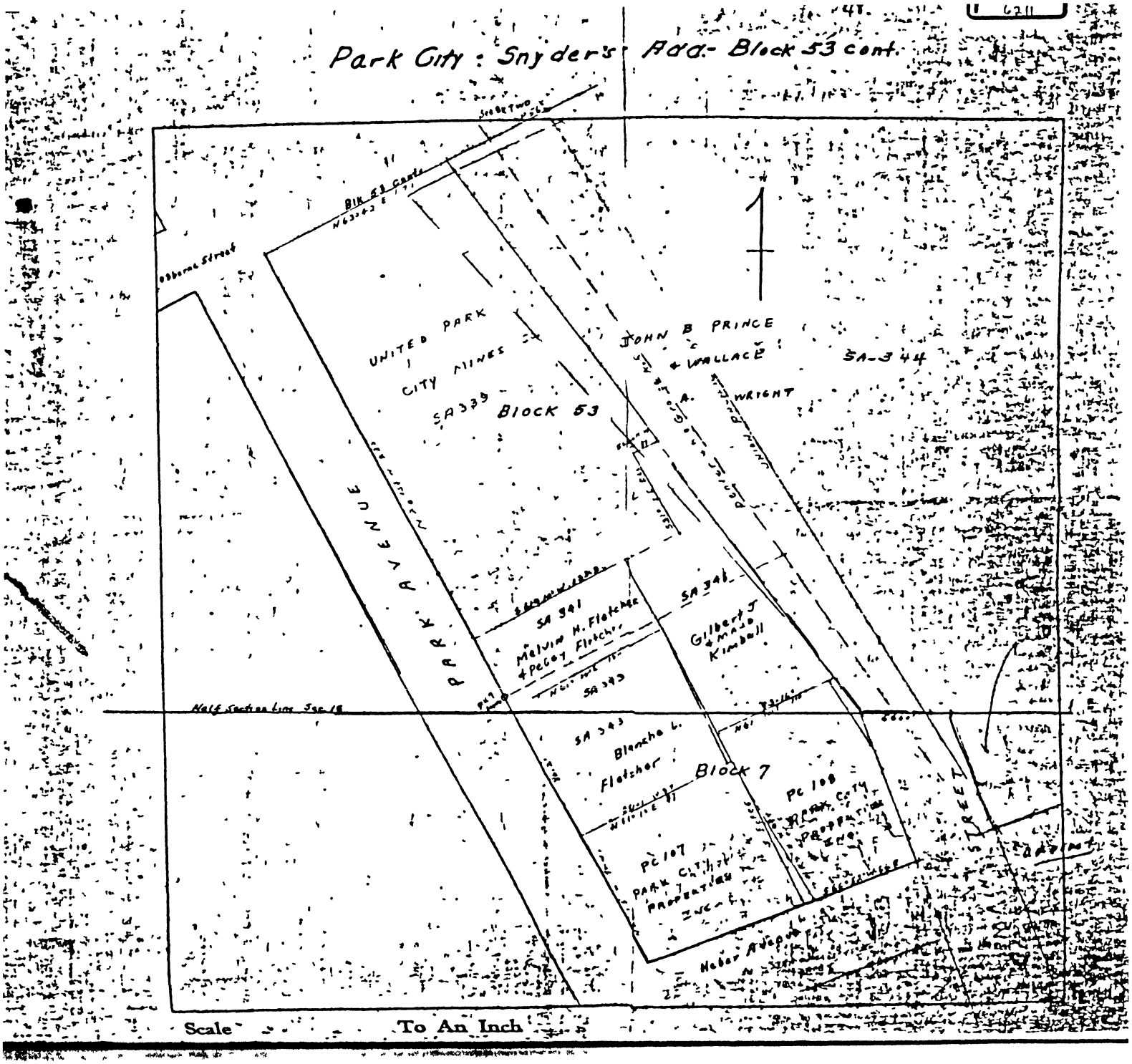
DEFENDANT'S EXHIBIT
16-512
6211

Assessor's Plats of Summit County, Utah

-Snyder's Add. - B's 1, 2, 11, 12, 13, 53.



1 - 12


Park City : Snyder's Add.- Block 53 cont.
Osborne Street
UNITED PARK CITY MINES
SA 339
BLOCK 53
JOHN B PRINCE & WALLACE
SA-344
WRIGHT
PARK AVENUE
SA 341
Melvin H. Fletcher & Peggy Fletcher
SA 341
Gilbert J & Mabel Kimball
SA 343
Blanche L. Fletcher
BLOCK 7
PC 107
PARK CITY PROPERTIES INC
PC 108
PARK CITY PROPERTIES INC
Half Section Line Sec 18
Scale To An Inch

BOOK PAGE

DEFENDANT'S EXHIBIT K-514 6211

16, T2S R4E, S.L.B.&M.

SEE PAGE #1 OF SNYDERS ADDITION